APPEAL NO. 92002

On December 3, 1991, a contested case hearing was held at (city), Texas, (hearing officer) presiding as hearing officer. He determined the respondent was injured in the course and scope of his employment, gave timely notice and was entitled to benefits under the Texas Workers' Compensation Act. TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The appellant cites error on the part of the hearing officer in certain of his findings and conclusions and urges that the evidence is factually insufficient to support those findings and conclusions. Appellant asks that the decision be reversed.

DECISION

We have carefully reviewed all the evidence of record and having done so, can not determine that the challenged findings and conclusions are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Accordingly, we affirm the decision of the hearing officer.

At the outset, we observe the evidence in this case is far from congruent or in harmony in many respects. This is not necessarily unusual in a contested case hearing nor is it a basis, in and of itself, for a determination that a claim has not been established by a preponderance of the evidence or that the great weight and preponderance of the evidence is against the establishment of a claim. In the case *sub judice*, it is apparent that the passage of time has taken its toll on the memories of witnesses and that the case suffered from the inherent difficulty frequently experienced when testimony is given through a translator, particularly with witnesses who have relatively modest formal educational backgrounds. Nonetheless, this is precisely what the hearing officer, as fact finder, encountered and had to resolve in his search for the facts in this case. From his vantage point of seeing and hearing the witnesses and observing and comparing their demeanor and judging their believability, he is in the far better position to determine the facts. Accordingly, the law specifically provides in Article 8308-6.34(e):

"The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence, . . ."

In his quest for the facts he must, and has the authority to, resolve conflicts and inconsistencies in testimony and is privileged to believe all or part or none of the testimony of a witness. Texas Workers' Compensation Commission Appeal No. 91119 (Docket No. BU-00041-91-CC-1) decided February 7, 1992, and authorities cited therein. The hearing officer may believe the testimony of an interested party to the exclusion of other testimony (Texas Employers Insurance Association v. Thompson, 610 S.W. 2d 208 (Texas App. - Houston 1981, no writ.) and believe one witness and disbelieve others. Cobb v. Dunlap, 656 S.W. 2d 550 (Tex. App. - Corpus Christi 1983, writ ref'd n.r.e.). That inferences or conclusions different from or inconsistent with those of the hearing officer may be drawn from the evidence, or even find equal support in the evidence, is not an appropriate basis to set aside a decision. *See,* Texas Workers' Compensation Commission Appeal No. 91102

(Docket No. FW-A-129124-01-CC-FW31) decided January 22, 1992; Texas Workers' Compensation Commission Appeal No. 91129 (Docket No. BU-00022-91-CC-1) decided February 10, 1992, and authorities cited therein.

Succinctly, the appellant's challenge to the sufficiency of evidence goes to the hearing officer's findings and conclusions which, together form the basis for the determination that the respondent was injured in the course and scope of his employment and that he gave the required notice of injury within 30 days. The respondent's testimony is somewhat disjointed; however, he testified, through a translator, that although he was not sure, he thought he injured himself on (date of injury), while employed by (employer), the employer. The injury occurred when he moved or threw a "skid" which was apparently used in moving a tractor from one place to another in preparation "to lay down some cement." He testified the "skid" weighed approximately 30 to 40 pounds and when he either picked it up fast or threw it over his back he was in pain and felt "like he could not twist" and "he could not get up." This happened before lunch and, although he felt bad in the afternoon, he finished work that day. The appellant states he reported his injury to "the safety man," (Mr. R) who was in the area at the time although he may not have been right at the place where the injury occurred. He may have had to look for Mr. R to report the injury. He stated (Mr JR) saw the injury and that he told Mr. JR that "he did not feel good." Mr. JR advised him to tell the safety man.

He acknowledges that he had received a briefing, when first employed, as to the requirement to report an injury and may have signed a form setting out safety procedures. The form was in English, which he does not read, and he does not remember that anyone explained the form to him in Spanish.

He testified on cross-examination that "so much time has passed" and that he can not remember the exact date the injury occurred. He did work after the injury and he knew it was close to the weekend and that he had asked for a "letter" so he could go to the doctor. He stated he did not work on the Saturday following his injury. He did work some after the injury and then did not work for "a week and a few days" and then went back to work at a different location ("the yard"). He told Mr. JR that he was ill and there was a chance he would not work, but he didn't inform anyone else when he was off work for the week and few days.

A telephonic interview between an insurance adjuster and the respondent on July 3, 1991, was admitted into evidence, without objection. In this interview, the respondent stated he did not remember the date of the injury "very well," but had put down (date of injury). He stated he reported the injury to Mr. R and kept telling him "we have to fill out a form" but that he (Mr. R) would not listen. He states he asked Mr. R many times and he would not give the form to him and that he couldn't stand the pain anymore and that he was going to the doctor with his own money. He went to a doctor on June 19. He also described how the injury occurred when he picked up heavy "mesquite" in front of a tractor. He stated in the telephone interview he had never had a back injury before.

Mr. JR testified (also through a translator) that he was a co-worker of the respondent at the time of his injury and that he had not had any contact with the respondent since the respondent stopped working at (employer). He recalled the respondent being injured on the job but does not remember the date. He remembers that it was "hot" when the injury occurred and that it occurred at the "(employer)" plant in (city), Texas. (From other evidence, this was the job site.) He states he and respondent were picking up and moving "skids" and "sticks" and the respondent "bent over and turned and felt pain in his back." The respondent complained about his back hurting. He advised the respondent to report the injury but doesn't know if he reported it to Mr. R.

Mr. JR gave a statement to the insurance company over the telephone. The July 31, 1991, statement was admitted into evidence without objection. Mr. JR was asked about the respondent's injury "about (date of injury)" and he stated that he and the respondent were picking up heavy wood when the respondent said "he had felt something funny in his back when he got up, when he bent over or got up . . . ." This was about noon time. He can not remember if he worked with the respondent the next day or anymore at all.

The appellant called three witnesses. The first was the director of safety and health (Mr. L) for the employer who testified the first the employer knew of any injury to the respondent was when they got a call from (Dr. H) office around June 20th concerning coverage for the respondent's injury. Mr. L investigated and no one knew of any injury except Mr. R who said the respondent had complained a few days earlier about "something in the lower part of his calf from when they were finishing some concrete." Mr. L also had advised the respondent about the company safety rules at the time of his hiring. He identified pay records which indicated the respondent worked during the period "5-20-91" through "6-2-91." Mr. L also testified that even minor injuries are required to be reported and some samples of these were placed in evidence.

One of the construction foremen (Mr. F) on the (employer) plant job site testified that he worked closely with the respondent but never had an injury reported to him nor did he observe the respondent show signs of being injured. He stated the respondent left the job around the 1st of June and that the job was physically demanding work. In a meeting to discuss the case following the respondent's claim of injury, Mr. F testified he remembered Mr. R mentioning that the respondent had complained to Mr. R about his (respondent's) leg hurting. This matter had not been reported to him (Mr. F) at the time.

Mr. R testified he was the on-site safety representative. He stated he made out injury reports and they were required even for minor injuries. He testified the respondent had reported to him that "the back part of his right thigh was bothering him, that it was sore." He did not fill out an injury form because he didn't think it was that serious. He stated the respondent said he was helping pour concrete but didn't say anything about lifting a skid. He could not remember the specific day the respondent complained of the sore leg but would say it was the day in "May we were pouring concrete -- the late part of May."

An employee notice of injury dated "6-25-91" and signed by the respondent stating an injury date of "(date of injury)" was admitted into evidence. Also a statement for a doctor (Dr. W) dated July 31, 1991, indicating the respondent's CAT scan shown evidence of a possible disc lateralizing to the right side at the L5-S1 level and that "[t]here are bulging discs numerous in the cervical spine" which do not appear to be pressing on the nerves. Dr. W states the respondent remains not fit for employment.

A report dated "8/01/91" from a chiropractor, Dr. H, indicates the respondent first saw Dr. H on "6/19/91" and that the respondent was a truck driver who was first injured on "6/14/91." An initial medical report also signed by Dr. H indicates date of injury as "(date of injury)." He notes the respondent "has consulted orthopedically with Dr. W" and states a current diagnosis of "cervical disc syndrome associated with cervical brachial neuralgia and neuritis complicated by subluxation complex, thoracic subluxation, lumbar disc syndrome with congruent sciatic neuritis complicated by myospasm and myocitis."

Appellant, in a painstakingly detailed brief, cites a number of instances of conflicts in the evidence and the absence of clarity in testimony in urging reversal on the basis that the decision is against the great weight and preponderance of the evidence. We have carefully reviewed the evidence presented and, viewing the hearing officer's decision from the four corners of the record, can not conclude that his findings, conclusions and decision were so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

As indicated above, resolving conflicts and determining facts are the functions of the hearing officer and this is made even more difficult when, as here, articulation abilities, language barriers and faded memories are present. It is not uncommon, nor is it fatal, that exact dates are not firmly remembered -- indeed it is not unusual to place an event by reference to other events. *See*, Texas Workers' Compensation Commission Appeal No. 91097 (Docket No. TY/91-079846/01-CC-TY41) decided January 16, 1992; Texas Workers' Compensation Commission Appeal No. 91123 (Docket No. DA-081465-02-CC-DA31) decided February 7, 1992. We conclude there was evidence presented from which the hearing officer could reasonably conclude the respondent suffered an on-the-job injury on (date of injury) and that he told a supervisor, Mr. R, that he had been injured on that day. His findings of fact are supported in the evidence although there is evidence that could support a contrary finding. This is not enough to warrant reversal. Texas Workers' Compensation Commission Appeal No. 91129 *Supra*.

Accordingly, the findings, conclusions and decision of the hearing officer are affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge